STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

JONATHAN DAVID HEWITT-EL,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 332946

Lower Court No. 10-2907-01

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee
_____

CHARI K. GROVE (P25812)
Attorney for Defendant-Appellant
_____

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

BY: **CHARI K. GROVE (P25812)**
Assistant Defender
State Appellate Defender Office
Suite 3300 Penobscot
645 Griswold
Detroit, MI 48226

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NOTICE OF HEARING

TO:
WAYNE COUNTY PROSECUTOR

PLEASE TAKE NOTICE that on February 28, 2017, the undersigned will move this Honorable Court to grant the within APPLICATION FOR LEAVE TO APPEAL.

STATE APPELLATE DEFENDER OFFICE

BY: /s/ Chari K. Grove
_____

CHARI K. GROVE (P25812)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: February 2, 2017

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STATEMENT OF JURISDICTION AND RELIEF REQUESTED

Defendant was convicted by jury trial of assault with intent to do great bodily hann less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, felony-firearm, MCL 750.227b, and armed robbery, MCL 750.529. He was sentenced, as a third habitual offender, to 7 to 20 years imprisonment for the assault with intent to do great bodily harm less than murder conviction, 3 to 10 years imprisonment for the felon-in-possession conviction, two years imprisonment for the felony-firearm conviction, and 171 months to 25 years imprisonment for the armed robbery conviction. The Court of Appeals affirmed Defendant's convictions and sentences, *People v Hewitt*, unpublished opinion per curiam of the Court ofAppeals, issued September 15, 2011 (Docket No. 299241). The Michigan Supreme Court denied leave to appeal. *People v Hewitt*, 490 Mich 974 (2011). Defendant filed a motion for relief from judgment in the trial court and he also filed a supplemental motion for relief from judgment. The trial court granted defendants motion for relief from judgment. The prosecution appealed by leave granted. The Court of Appeals reversed the opinion and order granting Defendant's motion for relief from judgment in an unpublished, per curiam opinion dated November 17, 2016. The Court of Appeals denied Defendant's motion for reconsideration in an order dated December 29, 2016.

In reversing the trial court's well-reasoned opinion, based on several days of evidentiary hearing, the Court of Appeals merely relied on its own disagreement with the trial court's judgment. The Court failed to afford deference to the trial court and merely substituted its own opinion regarding the facts. The trial court's findings are reviewed for clear error, and the clear error standard of review is *highly deferential* to the trial court; indeed, MCR 2.613(C) requires that regard be given to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *See People v McSwain*, 259 Mich App 654, 683; 676 NW2d

236, 251 (2003). The trial court's ultimate decision is reviewed for an abuse of discretion. An abuse of discretion can be found only where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made." *People v Williams*, 240 Mich App 316, 320, 614 NW2d 647 (2000). A mere difference in judicial opinion does not establish an abuse of discretion. *Alken–Ziegler, Inc. v Waterbury Headers Corp.*, 461 Mich 219, 227, 600 NW2d 638 (1999).

For the reasons that follow, Defendant submits that the decision of the Court of Appeals is clearly erroneous and will cause material injustice [MCR 7.302(B)(5)], and its decision conflicts with other decisions by this Court and the Court of Appeals. MCR 7.302(B)(3), (5). Defendant requests that this Court grant the application for leave to appeal or grant other peremptory relief as requested.

STATEMENT OF QUESTIONS PRESENTED

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINIDNG CAUSE AND PREJUDICE AND GRANTING THE MOTION FOR RELIEF FROM JUDGMENT WHERE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL; THE COURT OF APPEALS DID NOT ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RAISED IN THE MOTION FOR RELIEF FROM JUDGMENT AND THE TRIAL COURT DID NOT VIOLATE MCR 6.508; THE COURT OF APPEALS DID NOT FIND THAT THE ERRORS ADDRESSED BY THE TRIAL COURT IN THE MOTION FOR RELIEF FROM JUDGMENT WERE NOT OUTCOME DETERMINATIVE.

Trial Court answers, "Yes".

Court of Appeals answers “No.”

Defendant-Appellant answers, "Yes".

COUNTER STATEMENT OF FACTS

Defendant-Appellee Jonathan Hewitt-El was convicted of assault with intent to commit great bodily harm, felon in possession of a firearm, felony firearm, and armed robbery, on May 18, 2010, before the Honorable Bruce U. Morrow in the Wayne County Circuit Court. Defendant-Appellee moved for substitute counsel, which was denied. No alibi witnesses testified at trial. Trial counsel did not state that it was "trial strategy" to fail to produce alibi witnesses. Trial counsel failed to move to suppress prior similar convictions as impeachment evidence and, in direct examination, counsel introduced the fact that Mr. Hewitt-El had committed prior crimes and had served 19 years in prison. (Vol II, 88-89). The prosecutor brought out the fact that Defendant had five prior convictions for armed robbery. (Vol II, 100).

On June 4, 2010, Defendant was sentenced to 7 to 20 years, 3 to 10 years, 2 years, and 17 months to 25 years in prison, respectively. Defendant, through appellate counsel Daniel Rust, filed an appeal of right and the Court of Appeals affirmed his convictions.

Contrary to the statement of Plaintiff-Appellee, the Court of Appeals did not hold that the failure to produce alibi witnesses did not amount to ineffective assistance of counsel or that Defendant-Appellee failed to demonstrate prejudice. The Court of Appeals held that the trial court's denial of the motion for substitute counsel was not an abuse of discretion. The Court of Appeals never heard the alibi witnesses' testimony. The Court of Appeals' comment regarding prejudice did not apply to the failure to produce alibi witnesses.

Michigan Supreme Court denied leave to appeal.

Defendant filed, in propia persona, a Motion for Relief from Judgment MCR 6.501 et seq, raising issues which were not previously raised in the trial court, the Court of Appeals, or the Supreme Court, and claiming good cause in that appellate counsel was ineffective. Appellate

counsel was appointed and an extensive hearing was conducted over several days. The trial court granted Defendant's motion and ordered a new trial. The Plaintiff-Appellant filed for an interlocutory appeal. The Court of Appeals granted leave to appeal.

Additional facts are presented in the issues that follow.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINIDNG CAUSE AND PREJUDICE AND GRANTING THE MOTION FOR RELIEF FROM JUDGMENT WHERE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL; THE COURT OF APPEALS DID NOT ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM RAISED IN THE MOTION FOR RELIEF FROM JUDGMENT AND THE TRIAL COURT DID NOT VIOLATE MCR 6.508; THE COURT OF APPEALS DID NOT FIND THAT THE ERRORS ADDRESSED BY THE TRIAL COURT IN THE MOTION FOR RELIEF FROM JUDGMENT WERE NOT OUTCOME DETERMINATIVE.

Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewed for abuse of discretion. The findings of the trial court are to be given great deference. "[T]he level of deference we must give to the trial court under well-established Michigan law prohibits reversal if we merely disagree with the trial court." *Taylor v Mobley*, 279 Mich App 309, 315; 760 NW2d 234, 238 (2008). "A mere difference in judicial opinion does not establish an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174, 182 (2003).

The Court of Appeals' opinion reversing the trial court's opinion and order was based on the Court's disagreement with the trial court's judgment. The Court of Appeals failed to afford deference to the trial court and merely substituted its own opinion regarding the facts. The trial court's findings are reviewed for clear error, and the clear error standard of review is *highly deferential* to the trial court; indeed, MCR 2.613(C) requires that regard be given to the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *See People v McSwain*, 259 Mich App 654, 683; 676 NW2d 236, 251 (2003). The trial court's ultimate decision is reviewed for an abuse of discretion. An abuse of discretion can be found

only where "an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made." *People v Williams*, 240 Mich App 316, 320, 614 NW2d 647 (2000). A mere difference in judicial opinion does not establish an abuse of discretion. *Alken–Ziegler, Inc. v Waterbury Headers Corp.*, 461 Mich 219, 227, 600 NW2d 638 (1999).

A. Introduction

Contrary to the People's contention, the trial court *did* find that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome would have been different. (See Parts D-F). Contrary to the People's argument, there is no "law of the case" with regard to the issues raised by Defendant in his Motion for Relief from Judgment. (See Part C).

B. Law Governing Motions for Relief from Judgment

The trial court may grant relief from judgment where the defendant could have raised the issue in his appeal of right if the defendant shows good cause for failing to raise the issue on appeal and shows actual prejudice. MCR 6.508(D). Defendant has shown that he is entitled to relief because he had good cause for failure to "properly" raise these issues on appeal, MCR 6.508(D)(3)(a); namely, ineffective assistance of appellate counsel. *See e.g.*, *People v Reed*, 449 Mich 375 (1995); *People v Hardaway*, 459 Mich 878 (1998); *People v Kimble*, 470 Mich 305 (2004). Due process provisions of the Fourteenth Amendment entitle a criminal defendant to the effective assistance of counsel in his first appeal as of right. *Evitts v Lucey*, 469 US 387 (1985). Although an appellate attorney is not required to raise every non-frivolous issue on appeal, an attorney who has presented strong but unsuccessful appellate issues may still be deficient and prejudice his client by omitting a significant and obvious issue which would have resulted in reversal on appeal. *Matthews v Abramajtys*, 92 F Supp 2d 615 (ED Mich, 2000), aff'd on other

grds 319 F 3d. 780 (CA6, 2003). Appellate counsel is ineffective if clearly meritorious issues are not investigated or raised. *People v Brown*, 491 Mich 914 (2012). In *Brown*, the Supreme Court held that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness in failing to discover exculpatory evidence and in failing to effectively cross examine the sole complainant. The Court further held that this resulted in actual prejudice to the defendant for purposes of MCR 6.508(D). *See Higgins v Renico*, 362 F Supp. 2d 904 (ED Mich, 2005) (appellate counsel was ineffective for failing to raise the issue of ineffective trial counsel in failing to object to various evidentiary matters, and in failing to raise the issue of prosecutorial misconduct during closing argument; these issues were not clearly stronger than the issues presented.) Moreover, the Michigan Rules of Court specifically provide that "the Court may waive 'good cause' requirement of subrule (3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D).

People v Garrett, 495 Mich 908 (2013), cited by Plaintiff-Appellant, is inapposite because, as established in Part C that follows, Defendant-Appellee did not raise issues in his Motion for Relief from Judgment that were previously decided against him.

C. The trial court did not consider issues already decided by the Court of Appeals in Defendant's appeal of right; the Court of Appeals did not find that Defendant was not denied effective assistance of counsel by failing to call alibi witnesses.

There is no basis for the claim by the People or the Court of Appeals that the issues in the Motion for Relief from Judgment were previously decided by the Court of Appeals. The trial court did not abuse its discretion in granting a new trial, finding good cause (ineffective assistance of appellate counsel) and prejudice.

Defendant, through appellate counsel Daniel Rust, filed an appeal of right and the Court of Appeals affirmed his convictions. The Michigan Supreme Court denied leave to appeal. The issues raised in the appeal of right were the following:

> **DEFENDANT-APPELLANT IS ENTITLED TO A NEW TRIAL WHERE THE TRIAL COURT DENIED HIS REQUEST FOR NEW COUNSEL.**
>
> **DEFENDANT-APPELLANT IS ENTITLED TO A NEW TRIAL WHERE HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE JURY WAS MADE AWARE OF THE SPECIFIC NATURE AND NUMBER OF HIS PRIOR FELONY CONVICTIONS AND FAILED TO REQUEST THE PROPER JURY INSTRUCTION.**

Defendant filed, in propia persona, a Motion for Relief from Judgment MCR 6.501 et seq, raising issues which were not previously raised in the trial court, the Court of Appeals, or the Supreme Court, and claiming good cause in that appellate counsel was ineffective. The trial court ordered the prosecutor to respond to his motion, and issued an order on May 16, 2014, denying some of Mr. Hewitt's claims, but ordering an evidentiary hearing. The trial court appointed the State Appellate Defender Office as counsel on June 27, 2014, and appellate counsel filed an amended motion for relief from judgment, that there was legally insufficient evidence to support the conviction of felon in possession of a firearm.

The principal issue to be decided at the evidentiary hearing was whether trial counsel was ineffective for failing to investigate and produce witnesses, including alibi witnesses, on behalf of Mr. Hewitt-El. The issues were stated by Mr. Hewitt-El in his pro per motion as follows:

> **DEFENDANT WAS UNLAWFULLY DEPRIVED OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN TRIAL COUNSEL FAILED TO SECURE AND CALL TWO ALIBI WITNESSES DUE TO A NEGLIGENTLY INSUFFICIENT INVESTIGATION AND FOR FAILING TO REASONABLY INVESTIGATE AND**

INTERVEIW OTHER KNOWN ALIBI WITNESSES DEPRIVING DEFENDANT OF A SUBSTANTIAL DEFENSE.

DEFENDANT WAS UNLAWFULLY DEPRIVED OF HIS FEDERAL AND STATE CONSTITUTUIONA RIGHTS TO EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE MERITORIOUS ISSUES RAISED IN THIS MOTION FOR RELIEF FROM JUDGMENT.

Defendant provided supporting affidavits. The trial court granted the evidentiary hearing, after thoroughly discussing the requirement of MCR 6.500, stating that, "after a thorough review of the record, there is evidence to support a claim of ineffective assistance of trial and appellate counsel. The record reveals instances of trial counsel's failure to provide competent pretrial and trial assistance. Moreover, appellate counsel erred in failing to identify and effectively raise the ineffective assistance of trial counsel claim on appeal." Opinion and Order of May 16, 2014. P. 4-5.

The issues decided in the Motion for Relief from Judgment were *not* decided by the Court of Appeals in the appeal of right. The Court of Appeals addressed the issue of failure to grant the request for substitute counsel, and applied the law relevant to that issue, citing MCR 2.503(B)(1) and *People v Echavarria*, 233 Mich App at 369. The court concluded that defendant had not shown that a bona fide dispute existed with defense counsel regarding a fundamental trial tactic and that his request was untimely, coming the day of trial. The Court of Appeals did *not* address the issue of whether trial counsel was ineffective for failing to investigate and present witnesses or for failing to present a substantial defense. Nor did the Court of Appeals cite or discuss any law on ineffective assistance of counsel in addressing this issue. Opinion p. 1-4.

The Court of Appeals in the appeal of right did *not* find that there was no prejudice in trial counsel's failure to present witnesses on Defendant's behalf. That would have been impossible because the Court of Appeals did not know what the witnesses would have said. The Court of Appeals did not hear the witnesses' proffered testimony - because of ineffective assistance of trial counsel and ineffectiveness of appellate counsel for failing to raise the issue and failing to request a remand for an evidentiary hearing so that the witnesses could testify. The Court merely held, based on the record before it,that Defendant failed to show a bona fide dispute with trial counsel.

The People further asserts that the Court of Appeals found no ineffective assistance of counsel, implying that the Court found no ineffective assistance of counsel with regard to counsel's failure to present witnesses. This is clearly not the case. The only time the Court addressed ineffective assistance of counsel was with regard to the second issue, the failure to object or request a limiting instruction on use of prior convictions. The Court of Appeals found the following:

- Trial counsel was not ineffective for failing to object to the prosecutor's questioning of defendant regarding prior convictions because counsel elicited this information on direct examination and an objection would have been futile.
- Appellate counsel *abandoned* the claim that trial counsel was ineffective for failing to file a motion in limine by failing to address the merits of his contention that the prior convictions would have been ruled inadmissible.
- Trial counsel was not ineffective for failing to request an instruction on use of prior convictions because it would not have been appropriate, and because there

was not a reasonable probability that *a limiting instruction* would have caused a different result.

Thus, the finding that a limiting instruction would not likely have caused a different result is based on the assumption that the prior convictions were admissible, and the finding that counsel was not ineffective was limited to the "prior convictions" issue.

Defendant demonstrated good cause for the failure to raise the issues in his appeal of right. Appellate counsel made no attempt at all to investigate the alibi or the medical evidence, and failed to move for a remand on ineffective assistance of trial counsel. Appellate counsel did not contact any of Mr. Hewitt-El's family members in an attempt to find and interview the alibi witnesses or the medical witnesses. Appellate counsel merely argued in the Court of Appeals that the trial court should have granted Mr. Hewitt-El's request for substitute counsel. In rejecting this claim, the Court of Appeals more than once emphasized that there was no record of what the alibi witnesses would have testified to.

Furthermore, appellate counsel attempted to raise the prior convictions issue by asserting 1) that the trial court erred in allowing the prosecutor to impeach him with prior convictions and counsel was ineffective for failure to object, and 2) that trial counsel was ineffective for failing to file a motion in limine to suppress them. Appellate counsel did not move for an evidentiary hearing. With regard to the former argument by appellate counsel, the Court of Appeals held that, "There is no merit to this claim because it was defense counsel who elicited testimony from defendant about his prior convictions on direct examination." Opinion p. 4. With regard to the second argument, the Court of Appeals found that appellate counsel abandoned the claim because "defendant does not address the merits of his contention that the evidence did not qualify for admission under MRE 609." *Id*. Had appellate counsel moved for a remand and/or

adequately raised the issue of trial counsel's ineffectiveness in failing to move to suppress Mr. Hewitt's prior armed robbery conviction, it is likely that the Court of Appeals would have come to a different conclusion. Appellate counsel was therefore ineffective.

All of these issues, as well as the need for a record in the trial court, should have been obvious. The issues are significant, and they are clearly stronger than the issues actually raised by appellate counsel. Mr. Rust had no reasonable explanation for failing to pursue these issues.

When ineffective assistance of counsel, based on a failure to raise viable issues, is the justification for excusing procedural default, the movant must establish ineffective assistance of counsel pursuant to the standard set forth in *Strickland v Washington, supra*. *People v Reed*, 449 Mich 375 (1995). Due process provisions of the Fourteenth Amendment entitle a criminal defendant to the effective assistance of counsel in his first appeal as of right. *Evitts v Lucey*, 469 US 387 (1985). Although an appellate attorney is not required to raise every non-frivolous issue on appeal, an attorney who has presented strong but unsuccessful appellate issues may still be deficient and prejudice his client by omitting a significant and obvious issue which would have resulted in reversal on appeal. *Matthews v Abramajtys*, 92 F Supp 2d 615 (ED Mich, 2000), aff'd on other grds 319 F 3d. 780 (CA6, 2003). *See Higgins v Renico*, 362 F Supp. 2d 904 (ED Mich, 2005) (appellate counsel was ineffective for failing to raise the issue of ineffective trial counsel in failing to object to various evidentiary matters, and in failing to raise the issue of prosecutorial misconduct during closing argument; these issues were not clearly stronger than the issues presented.)

In *Mapes v Coyle*, 171 F3d 408, 428 (CA 6 1999), the Sixth Circuit found that appellate counsel was ineffective for failing to raise certain issues on appeal where the issues omitted were significant and probably obvious, these issues were clearly stronger than some of those

presented, the omitted issues were not dealt with in other assignments of error, and there seemed to be no reasonable justification for omitting these issues.

In *People v Brown*, 491 Mich. 914 (2012), the Supreme Court held that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness in failing to discover exculpatory evidence and in failing to effectively cross examine the sole complainant. The Court further held that this resulted in actual prejudice to the defendant for purposes of Mich. Ct. R. 6.508(D). The Court in *People v Armijo*, No. 308361, 2012 WL 3590166 (Mich Ct App August 21, 2012), likewise held that appellate counsel's failure to raise ineffectiveness of trial counsel on appeal was ineffective:

> "As discussed previously, defendant had a valid claim that [trial counsel] was ineffective. Therefore, there is a reasonable probability that defendant's appeal would have rendered a different result had [appellate counsel] raised the ineffective assistance of trial counsel issue on appeal. We conclude that [appellate counsel's] performance, in failing to raise the ineffectiveness of [trial counsel] on direct appeal, was objectively unreasonable. Although appellate counsel's failure to raise every issue of arguable legal merit does not constitute ineffective assistance, the question is 'whether a reasonable appellate attorney could conclude' that the issue of [trial counsel's] effectiveness was not 'worthy of mention on appeal.' *Reed*, 449 Mich. at 391.
> …
>
> Plaintiff has referred this Court to no case where this Court has found a defendant's trial counsel ineffective, yet nonetheless excused a defendant's appellate counsel for failing to raise such a meritorious argument."

Appellate counsel in the instant case was ineffective. The issue of ineffective trial counsel for failure to present alibi and medical witnesses was clearly significant and stronger than the issues actually raised. Appellate counsel made no attempt to investigate these issues, or to move for a remand hearing to make a record of the witnesses' potential testimony and trial counsel's ineffectiveness. The issue of failure to move to suppress Defendant's prior conviction

or to stipulate that he was ineligible to possess a firearm was not adequately raised in the Court of Appeals, and appellate counsel was therefore ineffective. Trial counsel's failure to move to dismiss the felon in possession charge was likewise a significant and strong issue since Mr. Hewitt was convicted of that charge without legally sufficient evidence. Appellate counsel's ineffectiveness provided adequate justification for excusing procedural default.

D. Defendant was denied his right to the effective assistance of trial and appellate counsel by his attorneys' failure to investigate and present alibi and medical witnesses in support of his defense and in support of his appeal; Defendant is entitled to relief from judgment having shown cause and prejudice, and the trial court did not err in granting Defendant a new trial.

Trial defense counsel David Cross, appellate counsel Daniel Rust, Leon Hewitt, Mark McCline, and Defendant Jonathan Hewitt-El testified at the hearing with regard to the missing alibi defense. Both counsel, Defendant, Dr. Teklehaimanont, and physical therapist BeJoice Thomas testified with regard to Defendant's medical issues.

Testimony Regarding Alibi Witnesses

Daniel Cross admitted that Mr. Hewitt gave him names of witnesses: one complete name and other partial names. (HT of 2-20-15, p. 29). One of the names was Sheila Jackson, another was Kelly, and Mr. Cross could not recall the other name. He spoke to Ms. Jackson but did not produce her as a witness. He claimed that she could not place Mr. Hewitt with her at the time that the alleged incident occurred. *Id*. at 41. However, the time reported by the victim to police was significantly different than the time he testified to at the preliminary examination and at trial. The police report states that the offense occurred at 12:05 to 12:30 p.m., and Mr. Cross admitted that that was the time frame he discussed with Sheila Jackson. *Id*. at 55. However, at the preliminary examination the victim testified that the incident occurred at 1:30 p.m. (PET 6). Mr.

Cross should have been aware of this discrepancy well before trial, when the victim again stated that the crime occurred at 1:30 or 1:45 p.m.

Mr. Cross claimed that he left it up to Mr. Hewitt-El to provide contact information for the other two witnesses because counsel did not have their last names or phone numbers. (HT 2-20-15, p. 29). He told the trial court before trial that Mr. Hewitt had given him names of witnesses. *Id*. at 48. Counsel could not remember writing any names down in his notes. He did not bring his file even though the subpoena directed him to do so, *id*. at 48-49, claiming that he was in the process of moving and could not find it.[1] Mr. Cross admitted that he did not seek the assistance of an investigator and that he did not even ask Defendant's son, Leon Hewitt, for help in finding the witnesses. *Id*. at 29-31. Mr. Cross denied that Leon Hewitt told him he could testify on Defendant's behalf. *Id*. at 31.

Mr. Cross further admitted that he did not go to the scene to question witnesses, in particular the witness who observed Mr. Lemon jumping out of the window. (HT of 2-20-2015, p. 33). He did not recall anything about the duct tape, but acknowledged that the police officer's testimony that there was no duct tape found in the victim's apartment was inconsistent with the photograph depicting a roll of duct tape on the coffee table. Mr. Cross did not request that the duct tape roll be fingerprinted. *Id*. at 34-36. He did not investigate whether there were security cameras at Defendant's apartment complex. [Mr. Cross's impeachment of Defendant Hewitt-El with his prior convictions is discussed in Issue II.]

Defendant Hewitt-El testified that he gave the names of alibi witnesses to Mr. Cross before trial. He provided the names Craig, Kelly, Mark McCline, and Leon Hewitt, in addition to Sheila Jackson. When the judge questioned him before trial, he mentioned some but not all of

[1] It should be noted that the first subpoena for Mr. Cross and his file was sent in November of 2014, giving him months to find the file.

the names of witnesses he wanted; he was just trying to get the judge to understand that counsel's trial strategy was not matching his. *Id*. at 22. Mr. Cross told Defendant that he talked to Sheila but he did not contact anyone else because it was Mr. Hewitt's job and his family's job to have those people contact him. (HT of 2-25-15, p. 5). Defendant understood that his attorney asked Ms. Jackson to be an alibi witness for the time frame of 12:00 to 12:30, and she stated that she was at church. However, at the preliminary examination Mr. Lemon said the perpetrators came to his home at 1:30 or 1:45 p.m. (PET 6). Mr. Cross should have been aware of that.[2] Mr. Hewitt testified that he was incarcerated in the county jail during the entire time before and during trial, and that he was only allowed two numbers: that of his attorney and one other person, whom Defendant chose as Sheila Jackson. *Id*. at 8. This severely hampered his ability to obtain contact information.

When Mr. Hewitt-El testified at trial, "Nobody else was in my home. We stayed together," he meant that at 12:00 or 12:30, when he started cooking, he was the only one inside his home. (HT of 2-25-15, p. 9-10). He answered the question as it was posed, as he was directed to do. *Id*. at 15. Shortly after 12:30 on February 14, 2010, Mark McCline showed up with his wife's vehicle and asked Mr. Hewitt-El to put a CD player in the truck. Then his son, Leon Hewitt, came over. *Id*. at 10, 19. They were outside and the dinner was cooking in the oven. *Id*. at 16. After installing the CD player, Mr. McCline left and Defendant and his son went upstairs for a short while. Leon left between 2:00 and 3:00 (or 1:30 and 2:30) p.m. Kelly was a woman who visited someone in the complex; Mr. Hewitt-El saw her as she was leaving. *Id*. at 20.

[2] Although Sheila Jackson did not testify at the *Ginther* hearing, the inability to find an estranged ex-girlfriend more than *five years* later is understandable. This Court should disregard Plaintiff-Appellant's unsupported assertion that "she had nothing helpful to say." (Appellant's Brief on Appeal, p. 31).

Mr. Hewitt-El appealed his conviction and his appointed attorney, Mr. Rust, came to visit him. Defendant told him about the witnesses that his trial counsel failed to investigate or present, and he gave Mr. Rust the witnesses' phone numbers. (HT 2-25-15, p.13). Mr. Rust told him that appeals are based on the law, that they were not re-trying the case, and that it was irrelevant. Mr. Rust never contacted any witnesses. *Id*. at 14.

Mr. Rust testified that Mr. Hewitt-El told him about the alibi and he called Sheila Jackson's phone number but never made contact. (HT 1-23-15, p. 16). Mr. Hewitt-El also gave him the name of his son, but he made no attempt to locate Leon Hewitt, other than ask Defendant for his phone number. He wrote a letter to Mr. Cross but did not speak to him, and he did not recall asking Mr. Cross for Leon's contact information. *Id*. at 17. And yet, it is clear from the trial transcript that Mr. Cross was in contact with Defendant's son at least as far as obtaining civilian clothing for Mr. Hewitt-El. Mr. Rust further failed to contact Mr. Hewitt's father, nor did he attempt to use any people-finder websites. *Id*. at 29. Mr. Rust claimed that Leon Hewitt was not a credible witness without ever having spoken to him. *Id*. at 28. Although Mr. Rust claimed that the alibi was inconsistent with Mr. Hewitt's trial testimony, he admitted that all Mr. Hewitt said at trial was that he was alone in the apartment at 12:00 or 12:30 while preparing a meal. *Id*. at 29. (The relevant time period was 1:30 to 3:00 p.m.) [The issue of impeachment of Defendant Hewitt-El with his prior convictions is discussed in Issue II.]

It was revealed at the hearing that Mr. Hewitt-El did indeed have alibi witnesses that would have testified had they been contacted by trial counsel or someone on his behalf. Mark McCline testified that on February 14, 2010, Valentine's Day, he went to Mr. Hewitt's apartment between the hours of 12:00 or 12:30 and 1:15 p.m. He had to be home by 2:00 p.m., so he probably arrived an hour before then. (HT 2-20-15, p. 76-77). Mr. Hewitt was just an

acquaintance. A mutual friend had given Mr. McCline Defendant's name as someone who could install a radio in his wife's vehicle, which Mr. Hewitt-El did that day. He recalled that Defendant was using a cane. *Id*. at 84. While McCline was there, a young man arrived and Mr. Hewitt said, "That's my son." *Id*. at 77-78. Mr. McCline testified that Defendant's trial attorney never contacted him, but Sheila Jackson did call in early March of 2010 to see if he would talk to a lawyer. Mr. McCline was amenable, but no lawyer ever called him. *Id*. at 79, 85. He would have come to court if subpoenaed. *Id*. at 86. Ms. Jackson called more than once, and talked to Mr. McCline's wife Kelly also. *Id* at 80.

Leon Hewitt testified that he went to visit his father on Valentine's Day in 2010. He wanted Mr. Hewitt-El to install a radio in his car. (HT 1-23-15, 47). He arrived at approximately 12:30 or 12:45 p.m. After they argued about the installation of the radio, he and his father visited for a while longer, and he left at about 2:00 p.m. Leon Hewitt knew Mr. Cross, and he told him that he would be a witness for his father. Mr. Cross had his telephone number. *Id*. at 65. However, Mr. Cross did not call him as a witness because he thought Leon would lie for his father. *Id*. at 48. Leon would have testified to the alibi at trial if he had been called as a witness. *Id*. Leon recalled being at a court proceeding, but was not sure if it was the preliminary examination or the trial or another court proceeding. *Id*. at 49, 54, 64. Defendant's first appellate lawyer did not contact Leon Hewitt.

Ineffective Assistance of Counsel

Trial counsel was ineffective for not investigating the possibility that these potential alibi witnesses would help exonerate his client. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const Am VI, XIV; Const 1963, art 1, §20. The test for determining ineffective assistance is twofold: whether "'counsel's

performance was deficient,"' and if so, whether his or her "'deficient performance prejudiced the defense."' *People v LaVearn*, 448 Mich 207, 213 (1995) (quoting *Strickland v Washington*, 466 US 668, 687 (1984)). Counsel's performance is deficient if it falls "below an objective standard of reasonableness under prevailing professional norms." *People v Stanaway*, 446 Mich 643, 687 (1994). The defendant is prejudiced where "there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Stanaway*, 446 Mich at 687-88; *See also People v Pickens*, 446 Mich 298, 314, 326 (1994) (adopting *Strickland* prejudice standard as matter of state constitutional law).

A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make "an independent examination of the facts, circumstances, pleadings and laws involved...." *Von Moltke v Gillies*, 332 US 708, 721, 68 SCt. 316, 92 LEd 309 (1948). This includes pursuing "all leads relevant to the merits of the case." *Blackburn v Foltz*, 828 F2d 1177, 1183 (CA 6, 1987). Counsel performs deficiently when he does not make a reasonable investigation. Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 US at 691; *See People v Grant*, 470 Mich 477, 485 (2004). "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005). Though counsel's strategic decisions are entitled to deference, counsel's strategy must be based on reasonable investigative decisions. *Strickland*, 466 US at 691; *Grant*, 470 Mich at 486. The failure of defense counsel to investigate and call exculpatory witnesses may amount to ineffective assistance of counsel, where the missing testimony affected the outcome of the trial. *People v Johnson*, 451 Mich 115 (1996) (failure to call six witnesses in murder case to support

defense that the decedent had been firing shots and was shot by someone other than defendant); *People v Bass*, 247 Mich App 385 (2001) (unexplained failure to call two witnesses known before trial who would have testified that defendant was not selling drugs).

Numerous cases have found that a failure to adequately investigate prior to trial negates an asserted reasonable strategy at the trial. See, for example, *English v Romanowski*, 602 F 3d 714 (Cir 6, 2010); *Avery v Prelesnik*, 548 F 3d 434 (2008); *Brown v Smith*, 551 F 3d 424 (Cir 6, 2008); *People v Grant*, 470 Mich 477 (2004); *People v Bass*, 247 Mich App 385 (2001).

In *Grant, supra* at 485, 486, 493, the Supreme Court wrote at length concerning where a failure to make a reasonable investigation of the facts prior to trial can constitute constitutionally ineffective counsel:

> `[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' Strickland, supra at 690–691, 104 S.Ct. 2052.
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> A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments. Counsel must make `an independent examination of the facts, circumstances, pleadings and laws involved....' Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 92 L.Ed. 309 (1948). This includes pursuing `all leads relevant to the merits of the case.` Blackburn v. Foltz, 828 F.2d 1177, 1183 (C.A.6, 1987).
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> The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome. *Carbin* at 590, 623 N.W.2d 884. Counsel's failure to investigate his primary defense prejudiced defendant. It adversely affected the outcome, depriving defendant of a fair trial. In light of the evidence presented at trial, there is a reasonable probability that the outcome would have been different.

This Court cannot fairly say that trial counsel fulfilled his "duty to make reasonable investigations," or that he ever made "a reasonable decision" that made the alibi investigation unnecessary. *Strickland*, 466 US at 691. As the Sixth Circuit has explained, "[w]here counsel fails to investigate and interview promising witnesses, and therefore ha[s] no reason to believe that they would not be valuable in securing [defendant's] release, counsel's inaction constitutes negligence, not trial strategy." *Workman v Tate*, 957 F2d 1339, 1345 (CA 6, 1992) (internal quotation and citation omitted); *see also Nealy v Cabana*, 764 F2d 1173, 1177 (CA 5, 1985) ("[C]ounsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."); *Workman v Tate, supra* (finding counsel deficient for failing to interview and call two witnesses who were with defendant at time of his arrest); *Robinson v United States*, 744 F Supp 2d 684, 693-694 (E D Mich, 2010) (defendant was denied his Sixth Amendment right to effective assistance of counsel where defense trial counsel failed to adequately investigate potential defense witnesses, and thus did not present any testimony from those witnesses to corroborate the defense theory of the case); *accord Hart v Gomez*, 174 F3d 1067, 1070 (CA 9, 1999) (finding counsel deficient for failing to investigate and introduce records that corroborated defense witness testimony); *Holsomback v White*, 133 F3d 1382, 1388 (CA 11, 1998) (finding counsel deficient for failing to contact physicians regarding lack of medical evidence in sexual abuse case); *see also Tucker v Prelesnik*, 181 F3d 747, 756 (CA 6, 1999) (finding counsel deficient for proceeding unprepared and failing to obtain complaining witness's medical records to use for impeachment at trial on assault charge). Trial counsel's performance may also be deemed deficient when counsel relies solely upon the weaknesses in the prosecution's case and fails to present a defense theory. *See, e.g.*, *Harris v Reed*, 894 F2d 871, 878-79 (CA 7, 1990) (counsel's reliance upon weakness of

prosecution's case and failure to present defense theory was ineffective); *United States ex rel. Cosey v Wolff*, 727 F2d 656 (CA 7, 1884) (counsel's out-of-hand rejection of potential witnesses and decision not to call them because prosecution's case was weak fell below minimum standards of professional competence).

In the instant case, trial counsel and appellate counsel were both well aware that Mr. Hewitt had alibi witnesses. Trial counsel spoke to Sheila Jackson, but did not attempt to discover the identity and whereabouts of the other witnesses, and did not seek funds for an investigator, leaving it up to Defendant himself, who was incarcerated with limited ability to perform his own investigation. Counsel admitted that he did not ask any member of Mr. Hewitt's family for assistance in finding the other witness(es). Defendant's son, Leon Hewitt, testified that he informed trial counsel that he would testify to the alibi, but counsel failed to file a notice of alibi and did not call him as a witness because he assumed Leon would lie for his father. Mr. McCline testified that, while he was contacted by Sheila Jackson, neither Mr. Hewitt's attorney nor anyone on his behalf ever contacted him. Mr. Rust admitted that he knew about the alibi witnesses, but, like Mr. Cross, appellate counsel made no effort at all to contact potential alibi witnesses. He admitted that he did not request assistance in this regard from either trial counsel or any family members of Mr. Hewitt, specifically his son, Leon Hewitt. In the end, appellate counsel failed to move for a remand for an evidentiary hearing on the issue of ineffectiveness of trial counsel for failure to investigate and present Mr. Hewitt's defense. Neither Mr. Cross nor Mr. Rust contacted Defendant's doctor or physical therapist, even though their testimony would have corroborated Mr. Hewitt's testimony and bolstered his credibility at trial. [See argument below]. Furthermore, there was a witness at the scene who likely saw the perpetrators jump out of the window. Mr. Cross did not investigate this witness and he did not

use an investigator to attempt to find this witness, who potentially could have described the two men. Nor did Mr. Cross use the photograph of the duct tape on the table to impeach the police officer. Failure to impeach a prosecution witness amounts to ineffective assistance of counsel.

It is not reasonable for counsel to wait for the witnesses themselves to come forward, or for his client to tell him to speak to them. A lawyer's duty is to investigate, not to wait for witnesses to come to him. *Towns*, *supra*; *Patterson, supra*. Counsel's duty exists separate from what his client tells him. Indeed, it exists even when his client admits guilt. ABA Standards for Criminal Justice, Defense Function, Part IV, Investigation and Preparation, 4-4.1(a) (cited in *Patterson*). Counsel must make a thorough investigation, particularly when it comes to finding witnesses. *Patterson*, supra, at 6 (citing *Rompilla v Beard*, 545 US 374, 381; 125 S Ct 2456; 162 L Ed 2d 360 (2005); *Wiggins v Smith*, 539 US 510, 533; 123 S Ct 2527; 156 L Ed 2d 471 (2003)).

In determining whether a defendant had met *Strickland's* prejudice prong in a case involving the failure to call alibi witnesses, the Sixth Circuit held:

> To evaluate a claim of prejudice, the court must assess how reasonable jurors would react to the additional alibi testimony had it been presented. . . . We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is exactly the task to be performed by a rational jury. *Avery v Prelesnik, supra*, citations omitted.

Had the jury been presented with Mr. Hewitt-El's alibi witnesses, some if not all of the jurors would have had a reasonable doubt about Mr. Hewitt-El's guilt. The trial court's finding in that regard is afforded great deference. Although one of those witnesses was Defendant's son, a family member or friend is often the person who is with the defendant at the time of the crime. Mr. McCline, on the other hand, was not a family member or even a friend. He was a mere

acquaintance of Mr. Hewitt-El, who was suggested to him as someone who could install a radio in his wife's car. Mr. McCline had no motive to make up an alibi for Mr. Hewitt-El. Again, the date was easy to recall – it was Valentine's Day. Plaintiff-Appellant repeatedly asserts her own subjective opinion that the alibi defense was not credible - that it was all "lies" because of what Appellant calls "glaring inconsistencies." (Appellant's Brief on Appeal, p. 23). Although there were some inconsistencies in the details, none of them were "glaring." And in fact, the witnesses were consistent in their testimony that Defendant was at his own home at the time of the offense, working on their vehicles. Again, the trial court's conclusion that the alibi defense was credible is entitled to deference by this Court. The record demonstrates that appellate counsel was wrong to assume that the alibi would have contradicted Mr. Hewitt-El's trial testimony. Defendant answered the specific questions he was asked, it was trial counsel's fault that his alibi witnesses were not produced, and if Mr. Hewitt-El had testified that his son and Mr. McCline were present after 12:30 p.m., the prosecutor would have destroyed his credibility by arguing that if this were true, Mr. Hewitt-El would have presented them as witnesses. Defendant does not have to show that he would have been acquitted if counsel had presented his alibi. He need only show a reasonable possibility that the outcome would have been different. He has clearly demonstrated prejudice and should be granted a new trial.

The People repeatedly assert "overwhelming evidence" of guilt. However, neither Appellant nor the Court of Appeals nor this Court can make the decision that the complainant was not mistaken and/or was being truthful in identifying Mr. Hewitt-El as one of the perpetrators. Mr. Lemon's identification was the only evidence implicating Defendant-Appellee. Mr. Hewitt-El maintains that he was not one of the assailants. Credibility is for the jury to determine, and due to counsel's errors, the jury was unable to fairly make that determination.

The medical/ physical therapist testimony

Mr. Hewitt-El testified that he was in an automobile accident in November of 2009 and was being treated for his injury in February of 2010. He was having pain in his back and down his leg, and he had trouble walking. He was not supposed to drive. He gave his attorney the name of the doctor who was treating him and asked him to contact the doctor, as well as his physical therapist, Mr. BeJoice. (HT of 2-25-2015, p. 11-12). Mr. Cross told him that he could not investigate all these people. Mr. Hewitt's father offered to pay for a private investigator, and Mr. Cross said Defendant did not need one. *Id*. Mr. Hewitt-El also asked counsel about the witness at the scene, who saw the assailants exit the window and drive away, but Mr. Cross said she was irrelevant. *Id*. at 13.

Trial counsel Cross admitted that he did not contact Mr. Hewitt-El's doctor or physical therapist and claimed that Defendant' physical condition did not have anything to do with the alibi so it was not relevant. (HT of 2-20-15, p. 33). However, although he seemed not to recall, at trial Mr. Cross examined Defendant in depth about his injury and his physical limitations because the victim had testified that the perpetrators jumped out of the broken front window and ran to their car.

With regard to the medical testimony, appellate counsel never pursued that issue because Mr. Hewitt-El testified to his medical condition at trial. However, Mr. Rust had to admit, during questioning by the trial court, that the medical testimony would have corroborated Mr. Hewitt-El's testimony, thereby making him more believable, and that Mr. Hewitt's credibility was a crucial issue at trial. (HT of 1-23-15, p. 26-27).

It was not reasonable trial strategy to fail to corroborate Mr. Hewitt's testimony about his physical disability with easily obtainable medical testimony. Mr. Cross believed the issue was

important enough to raise as part of the defense. It would have been far stronger and more convincing evidence had Dr. Teklehaimanot and Mr. BeJoyce testified.

Dr. Teklehaimanot testified that Mr. Hewitt-El had been in an automobile accident on November 25, 2009, and sustained an injury to his back. Mr. Hewitt-El described severe lower back pain shooting up the spine and down his leg. (HT of 2-20-15, p. 5). The doctor examined Mr. Hewitt-El on December 4, 2009, and diagnosed him with myofascial pain or acute spasms of the lumbosacral or spinal muscles of the neck, possible lumbar radiculitis, degenerative disk disease, sprain on the lumbosacral spine muscles and neck. Id. at 6. The pain from the inflammation and pinched nerve affects the back and travels down the leg, similar to sciatica. *Id*. at 7. Mr. Hewitt-El had trouble bending and standing. His range of motion was limited. *Id*. at 11. Dr. Tekelhaimanot prescribed pain medicine and a muscle relaxant. He ordered an MRI for Mr. Hewitt-El but it was never done. *Id*. at 13.

The medical records introduced at the hearing establish that:

- Mr. Hewitt went to the clinic reporting severe pain in the lower back, shooting up the neck and down the legs, since his automobile accident.
- Mr. Hewitt reported trouble walking and climbing stairs.
- Dr. Teklehaimanot diagnosed Mr. Hewitt with:
    - myofascial pain or acute spasms of the lumbosacral paraspinal muscles and neck muscles
    - possibility of lumbar ariculitis
    - myofascial pain and sprain of the lumbosacral paraspinal muscles and neck muscles
    - neuropathy

- degenerative disc disease, limited motion (See Exhibit A).

As late as February of 2010, Mr. Hewitt-El was placed on work employment disability with restrictions on lifting, housework, any kind of repetitive activities such as bathing, cleaning, moving furniture, picking objects up, and driving. These restrictions were to be in effect at least up to March 10, 2010. The doctor last saw Mr. Hewitt-El on February 16, 2010. No one contacted him about testifying at trial. (HT 2-20-15, p. 8-9). If his life depended on it, the doctor assumed that Mr. Hewitt-El could have possibly somehow climbed out of a window. It would be painful. *Id*. at 15-16. On the pain inventory, Mr. Hewitt reported 10 on a 10 point scale, 10 being the highest. (See Appendix A).

Dr. Teklehaimanot also referred Mr. Hewitt-El to a physical therapist, Bejoice Thomas, who testified similarly to the pain associated with Mr. Hewitt-El's injury and the difficulty walking. Mr. Hewitt was experiencing pain in his neck and lower back, and his gait was described as antalgic, or painful in nature - walking with a slow pace without taking full strides due to the pain. (HT 2-20-15, p. 25) (Antalgic is defined as "a limp in which a phase of the gait is shortened on the injured side to alleviate the pain experienced when bearing weight on that side"; "it is characterized by pain in lower extremities, which is aggravated by leg, hip and thigh movement, as well as by bearing weight" http://medical-dictionary.thefreedictionary.com/antalgic+gait), slow, with decreased step and stride length. (See Exhibit B). Mr. Hewitt-El's activities were restricted. *Id*. at 22. In response to the prosecutor's questioning, Mr. BeJoyce testified that it might be possible for one in Mr. Hewitt-El's condition to sit on a ledge and lift his legs over a ledge one or two feet tall, but not to step over it. *Id*. at 26.

Clearly, this medical testimony would have corroborated Mr. Hewitt-El's trial testimony, and would have exhibited that it would have been very difficult for Defendant to have chased the victim (or run away) by quickly jumping out of the broken window.[3] The missing evidence would have substantially supported Mr. Hewitt-El's credibility and impeached the testimony of the complaining witness.

Ineffective Assistance of Counsel

Trial counsel's failure to present this substantive defense resulted in ineffective assistance of counsel under the test set forth in *Strickland v Washington*, 466 US 668; 104 SCt 2052; 80 LEd2d 674 (1984) and *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A defense counsel's failure to raise a substantive defense, where there is substantial evidence to support the defendant's claim, may amount to ineffectiveness of counsel. *Tucker v Prelesnik*, 181 F3d 747, 756 (CA 6, 1999) (failure to obtain complaining witness's medical records to use for impeachment at trial on assault charge); *People v Trakhtenberg*, (2012); *People v Armstrong*, 490 Mich 281 (2011) (failure to pursue admission of complainant's cellular telephone records); *Workman v Tate*, *supra* (failure to interview and call two witnesses who were with defendant at time of his arrest); *Robinson v United States*, 744 F Supp 2d 684, 693-694 (E D Mich, 2010) (failure to adequately investigate potential defense witnesses to corroborate the defense theory of the case); *accord Hart v Gomez*, 174 F3d 1067, 1070 (CA 9, 1999) (failure to investigate and introduce records that corroborated defense witness testimony); *Holsomback v White*, 133 F3d 1382, 1388 (CA 11, 1998) (failure to contact physicians regarding lack of medical evidence in sexual abuse case); *People v Dixon*, 263 Mich App 393 (2004) (failure to lay the foundation for the admission of a tape recording of the complainant's 911 call, even though the substantive

[3] Unless both legs were amputated, or Mr. Hewitt were paralyzed, it would be impossible to prove that he was absolutely incapable of getting out of the window.

content of that call reached the jury); *Brown v Smith*, 551 F3d 424 (CA 6, 2008) (failure to investigate and obtain records related to complainant's counseling sessions); *Richey v Bradshaw* (On remand), 498 F3d 344 (CA 6, 2007) (failure to contact arson experts); *Dando v Yukins*, 461 F3d 791 (CA 6, 2006) (failure to consult expert in Battered Women's Syndrome); *People v Snyder*, 108 Mich App 754; 310 NW2d 868 (1981) and *People v McDonnell*, 91 Mich App 458 (1979) and *People v Nyberg*, 140 Mich App 160; 362 NW2d 748 (1984) (failure to pursue an insanity defense); *People v Moore*, 131 Mich App 416, 418; 345 NW2d 710 (1984); *People v LaVearn*, *supra* at 216; *People v Lewis*, 64 Mich App 175, 235 NW2d 100 (1975). Failure to raise a defense that could lead to acquittal is not legitimate strategy. *See People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996), (counsel had no legitimate strategy for failing to raise a promising defense)." *Id*.

Neither trial counsel nor appellate counsel had any legitimate strategy for failing to call at least one of the medical witnesses to corroborate Mr. Hewitt's testimony. Mr. Rust did not pursue the issue because Mr. Hewitt himself testified to his physical disabilities. However, appellate counsel had to admit that corroborating Defendant's testimony with medical evidence would have been much more convincing to the jury. As the Supreme Court said in *People v Armstrong*, *supra*, "Any attorney acting reasonably would have moved for the records' admission, particularly when, as here, attacking the complainant's credibility offered the most promising defense strategy." Trial counsel's failure amounted to ineffective assistance of counsel, and appellate counsel's failure to investigate this issue and request a hearing on remand amounted to ineffective assistance of appellate counsel. *Strickland v Washington*, *supra*. *People v Reed*, 449 Mich 375 (1995). Due process provisions of the Fourteenth Amendment entitle a criminal defendant to the effective assistance of counsel in his first appeal as of right. *Evitts v*

Lucey, 469 US 387 (1985). Although an appellate attorney is not required to raise every non-frivolous issue on appeal, an attorney who has presented strong but unsuccessful appellate issues may still be deficient and prejudice his client by omitting a significant and obvious issue which would have resulted in reversal on appeal. *Matthews v Abramajtys*, 92 F Supp 2d 615 (ED Mich, 2000), aff'd on other grds 319 F 3d. 780 (CA6, 2003). *See Higgins v Renico*, 362 F Supp. 2d 904 (ED Mich, 2005) (appellate counsel was ineffective for failing to raise the issue of ineffective trial counsel in failing to object to various evidentiary matters, and in failing to raise the issue of prosecutorial misconduct during closing argument; these issues were not clearly stronger than the issues presented.) In *Mapes v Coyle*, 171 F3d 408, 428 (CA 6 1999), the Sixth Circuit found that appellate counsel was ineffective for failing to raise certain issues on appeal where the issues omitted were significant and probably obvious, these issues were clearly stronger than some of those presented, the omitted issues were not dealt with in other assignments of error, and there seemed to be no reasonable justification for omitting these issues.

In *People v Brown*, 491 Mich. 914 (2012), the Supreme Court held that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness in failing to discover exculpatory evidence and in failing to effectively cross examine the sole complainant. The Court further held that this resulted in actual prejudice to the defendant for purposes of Mich. Ct. R. 6.508(D). The Court in *People v Armijo*, No. 308361, 2012 WL 3590166 (Mich Ct App August 21, 2012), likewise held that appellate counsel's failure to raise ineffectiveness of trial counsel on appeal was ineffective:

> "As discussed previously, defendant had a valid claim that [trial counsel] was ineffective. Therefore, there is a reasonable probability that defendant's appeal would have rendered a different result had [appellate counsel] raised the ineffective assistance of trial counsel issue on appeal. We conclude that [appellate counsel's] performance, in failing to raise the ineffectiveness of [trial counsel] on direct

> appeal, was objectively unreasonable. Although appellate counsel's failure to raise every issue of arguable legal merit does not constitute ineffective assistance, the question is 'whether a reasonable appellate attorney could conclude' that the issue of [trial counsel's] effectiveness was not 'worthy of mention on appeal.' *Reed*, 449 Mich. at 391.
> …
>
> Plaintiff has referred this Court to no case where this Court has found a defendant's trial counsel ineffective, yet nonetheless excused a defendant's appellate counsel for failing to raise such a meritorious argument."

Appellate counsel's ineffectiveness provides the good cause under MCR 6.508 for Defendant's failure to raise the issue in his appeal as of right. For all the reasons above, Defendant has also shown prejudice. Had his witnesses been presented at trial, there is a reasonable likelihood that the outcome of the proceedings would have different. Had trial counsel moved to suppress Mr. Hewitt-El's prior armed robbery, the motion would have been granted and the jury would not have been allowed to assume that, if he did it before, he likely did it this time. (See Issue II). Had trial counsel moved for a directed verdict on the felon in possession count, it would have been vacated. (See Issue III). Without the errors raised in this motion for relief from judgment, Defendant would have had a reasonably likely chance of acquittal, and there is evidence of Mr. Hewitt-El's actual innocence. MCR 6.508(D).

Cumulatively, Mr. Hewitt was denied a fair trial.

E. Defendant was denied his right to effective Assistance of Counsel where trial counsel failed to move to suppress Defendant's Prior Conviction and introduced it himself, failed to request a stipulation to a prior felony, and failed to move to dismiss the Felon in Possession Charge; appellate counsel was ineffective in failing to adequately raise the issue of impeachment in the appellate court, in failing to request an evidentiary hearing, and in failing to request dismissal of the felon in possession charge; defendant is entitled to relief from judgment having shown cause and prejudice and the trial court did not abuse its discretion in granting a new trial.

Trial counsel David Cross not only failed to seek exclusion of Mr. Hewitt-El's prior convictions, he actually brought out Defendant's prior convictions on direct examination, (Trial, Vol II, 89), and did not object when the prosecutor revealed that Mr. Hewitt-El had been convicted of five prior armed robberies. *Id*. at 100-101. Mr. Cross believed his prior armed robberies would be admissible under MRE 609 and also believed that they (or at least the most recent one) would be admissible to prove the felon in possession charge. Mr. Cross testified:

> Q [by defense counsel] [D]id you consider moving the Court to suppress Mr. Hewitt's prior convictions?
>
> A No. I did not.
>
> Q Do you remember what his prior convictions were for?
>
> A I believe there was at least armed robbery.
>
> Q And Mr. Hewitt was being tried for armed robbery, as well as assault, is that correct?
>
> A Armed robbery, assault. I believe it was also felon in possession of a firearm.
>
> Q So, the prior armed robbery was a similar offense to the offense for which he was being ~
>
> A Yes.
>
> Q Do you think that it was prejudicial, in any way, to, have the jury hear that he had a prior armed robbery conviction?

A I think that in every case where, where a prior conviction is admissible its prejudicial, not always avoidable, but certainly prejudicial.

Q But you didn't make a motion to suppress?

A No. I did not. (HT of 2-20-15, 36-37).

***

Q [BY THE DEFENDANT]: Well, by not filing a motion to have my priors -- You brought up my priors in the court. .

THE WITNESS: Your priors had already become part of the record by a stipulation between the parties that you were aware of, based upon the felon in possession of a firearm charge. One of those prior convictions had to be, became part of the prosecution's charge. And so, you it would either have been stipulated to or there would have been hearing on whether or not that would have come in. And if I recall, this was again back in 2010 we had a conversation about that.

THE DEFENDANT: A felon in possession charge -- Was the person holding the actual gun, was he a felon, to your recollection?

THE WITNESS: I don't know who was holding the gun, Mr. Hewitt.

THE DEFENDANT: I'm just saying, according to the testimony, Mr. Lemon said I was an aider and abettor. So, the other person was holding the gun.

THE WITNESS: That's correct. And I believe as a matter of law you would have been charged with that, as well. (HT 56-57).

* * *

Q [by defense counsel]: Mr. Cross, you said that Mr. Hewitt's prior conviction for armed robbery would have been admitted anyway?

A I believe so. Yes.

Q Are you aware of a United States Supreme Court case that says that under those circumstances that the nature of the prior felony can be, basically, suppressed, and that the defendant need only testify that he's been convicted of a prior felony?

> A I'm not sure specifically what case you are talking about, but I believe that it is consistent case law it's within the discretion of the trial Court.
>
> Q But you did not ask the trial Court to suppress the armed robbery, either on that basis or on the basis of improper impeachment with a similar prior conviction?
>
> A No. I did not. (HT 64).
>
> * * *
>
> Q [by the prosecutor]: Mr. Cross, are you familiar with Michigan Rule of Evidence 609?
>
> A Yes. I am.
>
> Q Did you anticipate that the armed robbery convictions would be admissible under MRE 609?
>
> A Yes. I did. Id. (HT 64).

In response to questioning by the court, Mr. Cross said the following:

> THE COURT: Okay. The way that I read 609 is – Everybody's reading the first part. And then 609 goes to B. And all of those conditions have to be met. And it says: That the Court determines that the evidence has significant probative value on the issue of credibility and that the probative value outweighs its prejudicial value.
>
> THE WITNESS: That's correct.
>
> THE COURT: So, certainly, you have to, it has to be within ten years, has to be a crime that deals with theft, dishonesty and false statement. But the ultimate determination is whether the judiciary decides its probative value versus its prejudicial value.
> THE WITNESS: That's correct.
>
> * * *
>
> THE COURT: Other than that they just have a past felony conviction And in instructing them, have you ever heard the Judge say within the last ten years, not even naming two years ago or four years ago? It's just, within this time frame, that they have a past felony conviction? Or not even mentioning a tithe frame?

> THE WITNESS I can't recall if, if - I can't recall if I've ever heard that stated in that manner.
>
> THE COURT: Right. But you never heard them state they had a prior felony conviction last year or 2007.
>
> THE WITNESS: I don't, I don't recall having heard that. No. HT 69-70).

Clearly, the armed robberies would almost assuredly have been suppressed by the trial court had the court been asked to exercise its discretion under MRE 609. The convictions were not probative of credibility, they were similar to (in fact the same as) one of the charges Defendant faced in the instant trial, and the prejudicial effect far outweighed any possible probative value. Although Mr. Cross claimed to have read MRE 609, he did not understand the law or he would have asked the court, in its discretion, to suppress the prior armed robbery, which he admitted was unduly prejudicial. Mr. Cross was also unaware of the well-established law that the nature of the prior felony should not be revealed when felon in possession of a firearm is one of the charged offenses. A stipulation that Mr. Hewitt-El had been previously convicted of a felony (without informing the jury that it was an armed robbery) would undoubtedly have been granted by the trial court.

Finally, Mr. Cross did not move to dismiss the felon in possession of a firearm charge on the ground that, since it was the codefendant who possessed the firearm and it was unknown whether he had a prior felony, the prosecutor was unable to prove that Mr. Hewitt-El aided and abetted felon in possession of a firearm.

All of these failures denied Mr. Hewitt-El his right to effective assistance of counsel, particularly where the instant trial was a credibility battle between Mr. Lemon and Mr. Hewitt-El, and Defendant's credibility was of utmost importance.

Appellate counsel Mr. Rust testified at the hearing that he raised the issues of denial of the request for substitute counsel and ineffective assistance of trial counsel for failure to move to suppress prior convictions. However, trial counsel did not speak to trial counsel to evaluate his experience in trying criminal cases or to determine whether trial counsel was aware of the rules and the law governing the issue. Nor did he move for an evidentiary hearing to allow the trial court to decide whether Mr. Cross was ineffective or whether his actions were trial strategy. (HT 1-23-15, p. 37-43). Moreover, the Court of Appeals rejected the issue on the grounds that Defendant had abandoned the claim because of appellate counsel's failure to present the relevant law or argue that the prior conviction was inadmissible for impeachment under MRE 609. Opinion, p. 4. The Court in that opinion did not, as the Court of Appeals later found, decide this issue on the grounds presented at the evidentiary hearing.

Ineffective Trial Counsel

Ineffective assistance claims are determined under the two-pronged Strickland test. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*. 46 Mich 298; 521 NW2d 797 (1994) (adopting *Strickland* as the Michigan constitutional standard). First, under *Strickland*, Counsel's performance must be deficient such that it falls "below an objective standard of reasonableness." *Strickland*, 466 US at 688; 104 S Ct at 2064; 80 L Ed 2d 674 (1984). Second, that conduct must prejudice the outcome of the trial. Prejudice exists where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694; 2068.

"[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id*. at 693; 2068. Moreover, "the cumulative effect of several

errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *LeBlanc*, 465 Mich at 591; 640 NW2d at 255 (2002).

An attorney's actions are not reasonable where they cannot be considered sound trial strategy. *Strickland*, 466 US at 689-90; 2065-66; *Hodge v Hurley*, 426 F3d 368, 385 (CA 6. 2005) (quoting Strickland and finding that defense counsel's failure to object to prosecution's impermissible closing argument was objectively unreasonable and prejudicial). The Michigan Court of Appeals has previously held that failure to object to the introduction of prejudicial character evidence that undermines a defendant's testimony can constitute ineffective assistance. *People v Ullah*, 216 Mich App 669, 685-86; 550 NW2d 568, 576-77 (1996).

It has been consistently held that defense counsel's failure to take the proper and evident steps to protect his client's constitutional rights during criminal prosecution constitutes ineffective assistance, and/or denies the defendant a fair trial. *See eg, Kimmelman v Morrison*, 477 US 635, 106 SCt 2574, 91 LEd2d 305 (1986) (Counsel's conduct in failing to move to suppress evidence seized in a warrantless search of defendant's home was constitutionally deficient); *United States v Easter*, 539 F2d 663 (CA 8, 1976) (defendant denied effective assistance when his attorney failed to move to suppress fruits of arrest which evidence suggested was made without probable cause); *Smith v Dugger*, 911 F2d 494 (CA 11, 1990) (trial counsel's failure to move to suppress defendant's confession constituted ineffective assistance of counsel); *Goodwin v Balkcom*, 684 F2d 794 (CA 11, 1982) (trial counsel's failure to move to suppress confession constitute ineffective assistance of counsel where law provided avenue to suppress confession); *United States v Matos*, 905 F2d 30 (CA 2, 1990) (trial counsel's failure to file suppression motion and preserve issue for review on appeal may constitute ineffective assistance of counsel); *People v Thomas*, 184 Mich App 480, 481 (1990) (ineffective assistance to fail to

challenge the statement made after what was revealed at the preliminary examination to be an illegal arrest); *People v Means* (On Remand), 97 Mich App 641 (1980) (serious mistake, where counsel failed to move to suppress an identification which was the fruit of an illegal photo showup); *People v Davis*, 102 Mich App 403 (1980) (defense counsel's failure to move for a *Walker* hearing was a serious mistake where there was evidence that defendant was so intoxicated he could not effectively waive his *Miranda* rights); *People v Ullah*, 216 Mich App 669, 684-686 (1996) (failure to move for suppression of inadmissible similar acts evidence).

Trial counsel's actions in the instant case were unreasonable, un-strategic, and fell below professional norms. Defense Counsel failed to present a pre-trial motion in limine to exclude Mr. Hewitt's prior record, and introduced Mr. Hewitt's prior convictions himself during direct examination, and allowed cross examination as to the nature of those convictions, all because he believed that they would be admissible. Counsel was either unaware that the judge would have to exercise discretion under MRE 609 or merely assumed that the prior robberies would be admissible and did not bother to ask the judge to exercise his discretion. Had a motion been made, the judge would very likely have suppressed the prior armed robberies as unduly prejudicial since they was only tangentially relevant to credibility and their similarity to the offense for which Mr. Hewitt-El was being tried weighed heavily against admission. Counsel was also unaware that he could request a stipulation that Mr. Hewitt was ineligible to possess a firearm without revealing the nature of the prior conviction, or he intentionally failed to request a stipulation.

There is no reasonable strategy to forego filing a motion in limine to suppress prior convictions, nor is it reasonable to waive an objection and admit past convictions that can have no other effect but to prejudice the defense in the eyes of the jury.

Michigan Rule of Evidence 609, as amended by *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988), establishes a presumption that past convictions are inadmissible to impeach the credibility of a witness: "For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination," and several limited exceptions are met. MRE 609(a).

The only exceptions to this otherwise broad prohibition are for crimes containing "an element of dishonesty or false statement," or theft crimes punishable by more than one year that are determined to have "significant probative value." MRE 609(a). Where the witness to be impeached is a defendant, the probative value of a theft crime must be found to outweigh potential prejudice to the defendant. MRE 609(a)(2)(B).

In *People v Allen, supra*, the Michigan Supreme Court established a bright-line tri-partite test for the use of past convictions to impeach a witness. While crimes that contain an element of false-statement or dishonesty are always admissible, and other, non-theft crimes lacking an element of dishonesty must always be excluded, crimes involving an element of theft are subject to judicial discretion. *Allen*, 429 Mich at 604-05; 420 NW2d at 522-23. The Court determined that while theft crimes have often been considered analogous to crimes of dishonesty, in reality they are not necessarily probative of veracity, and "jurors will invariably use [them] . . . to draw conclusions about defendant's general character" such that the chance for prejudice is high. *Id*. at 595-96; 517.

Consequently, in considering whether to permit impeachment with a theft crime, the court must weigh the relative probative and prejudicial value of admission, analyzing only certain delineated factors. To determine the probative value, the court may consider only whether

"the crime is indicative of veracity, and the vintage." *Id*. at 606; 522. To determine prejudice, the court must consider "the similarity to the charged offense and the importance of the defendant's testimony." *Id*. at 606; 522. "The prejudice factor would, of course, escalate with increased similarity and increased importance of the testimony to the decisional process." *Id*. "The court must articulate, on the record, the analysis of each factor." MRE 609.

The Court of Appeals has observed that "[c]rimes of theft are *minimally probative*." *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992) (emphasis added). In *People v Johnson*, 167 Mich App 168; 421 NW2d 617 (1988), the Court found that the moderate probative value of three prior theft-crimes was outweighed by their prejudice to the defendant. The Court there highlighted the substantial prejudice caused by the similarity of the crimes, the need for the defendant to testify in the absence of other defense witnesses, and the fact that the prosecution had impeached him with other witnesses. *Id*. at 173-74; 618-19.

Similarly, in *People v Pedrin*, a companion case decided together with Allen, the Court found reversible error in the admission of a single one-year-old conviction for breaking and entering with the intent to commit larceny, where the defendant was on trial for breaking and entering an unoccupied building with the intent to unlawfully drive away an automobile. *Allen*, 429 Mich at 610-11. Despite its recent vintage, which "accent[ed]" the otherwise moderate probative value of such a theft-crime, the Court found the similarity to the charged offense and the importance of the defendant's testimony where he "had no other means of presenting his version of events" to be far too prejudicial. *Id*.

Plaintiff-Appellee has no real response to the fact that the assault with intent to commit armed robbery convictions were inadmissible for impeachment, other than to cite two cases, one of which is inapposite. (People v Bartlett, 197 Mich App 15 (1992) involved a prior breaking

and entering). *People v Minor*, 170 Mich App 731 (1988) actually supports Defendant-Appellee's argument.

Defense counsel was unquestionably ineffective; he not only failed to object, but waived any objection entirely, when he introduced the prior convictions on direct examination. Consequently, despite the rule's clear command, because of counsel's ineffectiveness, the trial court did not engage in any analysis of the prejudicial or probative value before admitting the evidence. While Michigan courts have previously held that "the trial court's failure to articulate on the record its analysis of these factors does not require reversal if the trial court was aware of the pertinent factors and of its discretion," *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754, 768 (2005) (emphasis added), here there was no objection, no motion in limine, and is no exercise of discretion by the trial court. Based on the obvious prejudice in allowing the jury to hear that Mr. Hewitt-El had previously been convicted of the same, violent crime, a proper balancing of prejudice versus probative value would undoubtedly have resulted in suppression of the prior conviction.

Trial counsel also testified at the hearing that the armed robbery would be admitted because Mr. Hewitt was charged with felon in possession of a firearm. Counsel failed to recognize (or simply ignored) that he could have prevented the jury from learning that Mr. Hewitt-El had a felony conviction for a similar assaultive crime by seeking a stipulation that Defendant had been convicted of a felony within the previous ten years that made him ineligible to possess a firearm. The defense was entitled to such a stipulation. Where the fact of a prior conviction, but not its identity, is an element of the crime, and where "the name or nature of the prior offense raises the risk of a verdict tainted by improper considerations," it is an abuse of discretion for a trial judge to refuse the defendant's stipulation conceding the prior-conviction

element of the crime. *Old Chief v United States*, 519 US 172, 174; 117 S Ct 644; 136 L Ed 2d 574 (1997); *accord People v Swint*, 225 Mich App 353 (1997).

Old Chief was charged with the federal crime of felon-in-possession-of-a-firearm. *Old Chief*, 519 US at 174. He offered to stipulate that he had been convicted of the kind of felony-one punishable by more than one-year's imprisonment-that made him ineligible to possess a firearm. The prosecutor refused to stipulate, though, and the trial judge refused to require him to. The prosecutor thereafter introduced in evidence the order of judgment and commitment for Old Chief's prior conviction for assault causing serious bodily injury. In the United States Supreme Court, Old Chief argued that the trial judge abused his discretion by refusing to require the stipulation. The Supreme Court agreed. While the name of the predicate offense added nothing of relevance to the prosecution's proofs that the proposed stipulation would not have provided, it carried with it the risk that the jury would infer the defendant's bad character from the nature of his prior offense, and decide to convict, in whole or part, on that basis. As the Court put it,

> "[f]or purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other. In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available." *Id.* at 191 (emphasis added).

The Court of Appeals followed *Old Chief*'s reasoning in *Swint*. The defendant in that case was charged with the Michigan version of felon-in-possession-of-a-firearm, and in order to avoid disclosing to the jury that his prior conviction was for "assault with a dangerous weapon," offered to stipulate both that the prior conviction was for "felonious assault" and that it rendered him ineligible to possess a firearm. *Swint*, 225 Mich App at 355, 377. The Court of Appeals,

following *Old Chief*, concluded that the trial judge's refusal to accept the proposed stipulation was an abuse of discretion: "On the basis of the persuasive authority of *Old Chief*, we find that the trial court abused its discretion by refusing to accept defendant's stipulation." *Id*. at 379.

Had he sought it, trial counsel in the instant case would have been entitled to the same sort of stipulation to which *Old Chief* and *Swint* were entitled. The nature of the convictions that led to the felony and lawful imprisonment was irrelevant. A refusal to allow such an *Old Chief/Swint*-style stipulation would have been an abuse of judicial discretion.

Finally, trial counsel was ineffective for failing to recognize that the felon in possession of a firearm charge should have been dismissed, obviating the need to request a stipulation at all. The firearm was at all times in possession of "Terry." There was no evidence that the principal, Terry, committed the crime of felon in possession of a firearm. It is the principal's status as a felon that makes possession of the firearm a felony under MCL 750.224f. Although, according to the complainant, Terry possessed a firearm and Mr. Hewitt-El encouraged Terry's use of the gun, there was no evidence that Terry had been convicted of a felony, and there was no evidence that Defendant Hewitt-El knew Terry had been convicted of felony if indeed he had been. In *United States v Gardner*, 488 F3d 700 (CA6, 2007), the Sixth Circuit held that in order to prove the defendant guilty of aiding and abetting the crime of felon in possession of a firearm, there had to be evidence that the principal (McMillion) was guilty of possessing a firearm having been convicted of a felony: "Thus, Gardner's conviction on this count depends first on whether McMillion could have violated [the felon in possession statute]." Although the prosecution in *Gardner* presented evidence that the principal had been convicted of a felony, the Court reversed the defendant's conviction because the government presented no evidence that the defendant knew or should have known that the principal was a convicted felon. In the instant case, the

prosecution did not know the identity of Terry and obviously had no way to determine whether he was a convicted felon. Absent proof that the principal committed the crime, Defendant Hewitt should not have been charged with felon in possession of a firearm. The risk of a verdict based on improper grounds was obvious. As the Supreme Court noted in *Old Chief*, "evidence of the name or nature of the prior offense generally carries a risk of unfair prejudice to the defendant. That risk will vary from case to case. . . . Where a prior conviction was for . . . one similar to other charges in a pending case the risk of unfair prejudice would be especially obvious." *Id.* at 173. There was no legitimate strategy in service of which trial counsel might have preferred to expose the jury to the nature and number of his client's prior felonies. *See People v Stubli*, 163 Mich App 376, 379-80 (1987). In its opinion and order, the trial court did not clearly include a finding based on this specific claim. The Court of Appeals refused to address the issue. However, this issue was raised below and Defendant submits that this Court should either address the issue and vacate the felon in possession charge, or remand to the trial court for a finding on this issue.

Ineffectiveness of Appellate Counsel

Appellate counsel attempted to raise part of this issue by asserting 1) that the trial court erred in allowing the prosecutor to impeach him with prior convictions and counsel was ineffective for failure to object, and 2) that trial counsel was ineffective for failing to file a motion in limine to suppress them. Appellate counsel did not move for an evidentiary hearing. With regard to the former argument by appellate counsel, the Court of Appeals held that, "There is no merit to this claim because it was defense counsel who elicited testimony from defendant about his prior convictions on direct examination." Opinion p. 4. With regard to the second argument, the Court of Appeals found that appellate counsel abandoned the claim because

"defendant does not address the merits of his contention that the evidence did not qualify for admission under MRE 609." *Id*. Had appellate counsel moved for a remand and/or adequately raised the issue of trial counsel's ineffectiveness in failing to move to suppress Mr. Hewitt-El's prior armed robbery conviction, it is likely that the Court of Appeals would have come to a different conclusion. Appellate counsel was therefore ineffective.

As indicated above, appellate counsel made no attempt at all to investigate the alibi or the medical evidence, and failed to move for a remand on ineffective assistance of counsel. Appellate counsel did not contact any of Mr. Hewitt's family members in an attempt to find and interview the alibi witnesses or the medical witnesses. Appellate counsel merely argued in the Court of Appeals that the trial court should have granted Mr. Hewitt's request for substitute counsel. In rejecting this claim, the Court of Appeals more than once emphasized that there was no record of what the alibi witnesses would have testified to. All of these issues, as well as the need for a record in the trial court, should have been obvious. The issues are significant, and they are clearly stronger than the issues actually raised by appellate counsel. Mr. Rust had no reasonable explanation for failing to pursue these issues.

When ineffective assistance of counsel, based on a failure to raise viable issues, is the justification for excusing procedural default, the movant must establish ineffective assistance of counsel pursuant to the standard set forth in *Strickland v Washington, supra*. *People v Reed*, 449 Mich 375 (1995). Due process provisions of the Fourteenth Amendment entitle a criminal defendant to the effective assistance of counsel in his first appeal as of right. *Evitts v Lucey*, 469 US 387 (1985). Although an appellate attorney is not required to raise every non-frivolous issue on appeal, an attorney who has presented strong but unsuccessful appellate issues may still be deficient and prejudice his client by omitting a significant and obvious issue which would have

resulted in reversal on appeal. *Matthews v Abramajtys*, 92 F Supp 2d 615 (ED Mich, 2000), aff'd on other grds 319 F 3d. 780 (CA6, 2003). *See Higgins v Renico*, 362 F Supp. 2d 904 (ED Mich, 2005) (appellate counsel was ineffective for failing to raise the issue of ineffective trial counsel in failing to object to various evidentiary matters, and in failing to raise the issue of prosecutorial misconduct during closing argument; these issues were not clearly stronger than the issues presented.)

In *Mapes v Coyle*, 171 F3d 408, 428 (CA 6 1999), the Sixth Circuit found that appellate counsel was ineffective for failing to raise certain issues on appeal where the issues omitted were significant and probably obvious, these issues were clearly stronger than some of those presented, the omitted issues were not dealt with in other assignments of error, and there seemed to be no reasonable justification for omitting these issues.

In *People v Brown*, 491 Mich. 914 (2012), the Supreme Court held that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness in failing to discover exculpatory evidence and in failing to effectively cross examine the sole complainant. The Court further held that this resulted in actual prejudice to the defendant for purposes of Mich. Ct. R. 6.508(D). The Court in *People v Armijo*, No. 308361, 2012 WL 3590166 (Mich Ct App August 21, 2012), likewise held that appellate counsel's failure to raise ineffectiveness of trial counsel on appeal was ineffective:

> "As discussed previously, defendant had a valid claim that [trial counsel] was ineffective. Therefore, there is a reasonable probability that defendant's appeal would have rendered a different result had [appellate counsel] raised the ineffective assistance of trial counsel issue on appeal. We conclude that [appellate counsel's] performance, in failing to raise the ineffectiveness of [trial counsel] on direct appeal, was objectively unreasonable. Although appellate counsel's failure to raise every issue of arguable legal merit does not constitute ineffective assistance, the question is 'whether a reasonable appellate attorney could conclude' that the issue of [trial counsel's]

> effectiveness was not 'worthy of mention on appeal.' *Reed*, 449 Mich. at 391.
> …
>
> Plaintiff has referred this Court to no case where this Court has found a defendant's trial counsel ineffective, yet nonetheless excused a defendant's appellate counsel for failing to raise such a meritorious argument."

Appellate counsel in the instant case was ineffective. The issue of ineffective trial counsel for failure to present alibi and medical witnesses was clearly significant and stronger than the issues actually raised. Appellate counsel made no attempt to investigate these issues, or to move for a remand hearing to make a record of the witnesses' potential testimony and trial counsel's ineffectiveness. The issue of failure to move to suppress Defendant's prior conviction or to stipulate that he was ineligible to possess a firearm was not adequately raised in the Court of Appeals, and appellate counsel was therefore ineffective. Trial counsel's failure to move to dismiss the felon in possession charge was likewise a significant and strong issue since Mr. Hewitt-El was convicted of that charge without legally sufficient evidence. Appellate counsel's ineffectiveness provides adequate justification for excusing procedural default.

F. The trial court correctly found actual prejudice, MCR 6.508(D), in the improper introduction of multiple prior assaultive, similar offenses.

Although the People attempt to suggest that there was no prejudice and that the trial court somehow "skipped" the prejudice finding, the trial court correctly found that the prejudice engendered by the admission of Mr. Hewitt's prior armed robbery conviction was substantial and absolute.[4] This finding, accorded great deference, is correct. As in *Pedrin*, Mr. Hewitt-El was the sole person able to testify in his defense (due to counsel's ineffectiveness in failing to

[4] That the trial court did not go into as much detail as Plaintiff-Appellant would prefer, the fact is that the trial court found prejudice sufficient to grant the motion for relief from judgment.

investigate his alibi). And the offense was identical to the one charged, increasing the likely prejudice even further.

It is well-recoginized that juries tend to place great weight on evidence that a defendant has committed previous crimes, and that safeguards are needed to prevent three likely forms of misuse:

> First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no 'innocent' man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged. *People v Allen*, 429 Mich 558, 569 (1988).

Introduction of the unnecessary and highly prejudicial evidence of multiple prior assaultive, similar crimes undermined Mr. Hewitt-El's right to a fair trial and trial counsel was ineffective in failing to move to exclude the prior armed robbery. In *People v Ullah, supra*, the Court found that failure to object to prohibitively prejudicial evidence can alone constitute ineffective assistance warranting reversal. *Id*. at 685-86. Counsel's behavior in not just failing to exclude, but in admitting the evidence himself, was objectively unreasonable. The trial court did not abuse its discretion in finding both trial and appellate counsel ineffective, and in finding actual "absolute" prejudice.

Conclusion

For all the reasons above, Defendant has shown prejudice. Had his witnesses been presented at trial, there is a reasonable likelihood that the outcome of the proceedings would have different. Had trial counsel moved for a directed verdict on the felon in possession count, it would have been vacated. Had trial counsel moved to suppress Mr. Hewitt's prior armed robbery, the

motion would have been granted and the jury would not have been allowed to assume that, if he did it before, he likely did it this time. Cumulatively, Mr. Hewitt-El was certainly denied a fair trial. Were it not for counsel's errors and omissions, there is a reasonable probability that the result would have been different, and there is evidence of Mr. Hewitt-El's actual innocence. This Court cannot be confident in the verdict of guilt, and the trial court did not in any sense abuse its discretion by granting Defendant's Motion for Relief from Judgment.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellee asks that this Honorable Court grant Defendant's Application for Leave to Appeal or peremptorily reverse the judgment of the Court of Appeals and AFFIRM the trial court's opinion and order granting his Motion for Relief from Judgment.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Chari K. Grove

BY:_____

CHARI K. GROVE (P25812)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: February 2, 2017